

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREGORY REDMAN	:	
for Redetermination of a Deficiency or for Refund of	:	ORDER
New York State and New York City Personal Income Tax	:	DTA NO. 819108
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1995.	:	

Petitioner, Gregory Redman, 120-31 Francis Lewis Boulevard, Cambria Heights, New York 11411, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1995.

By motion dated November 26, 2002, the Division of Taxation ("Division"), appearing by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), moved for dismissal of petitioner's petition or, in the alternative, summary determination on the grounds that there were no material issues of fact and the undisputed facts mandated a finding in the Division's favor. Answering papers due by December 27, 2002 were never filed, and such date commenced the 90-day period for issuance of this order. After due consideration of the Division's motion, the supporting affidavit of John E. Matthews, Esq., and attached exhibits, and all of the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion to dismiss or, in the alternative, motion for summary determination should be granted.

FINDINGS OF FACT

1. By certified letter dated July 10, 2002, petitioner requested a "prompt hearing" with respect to a predecision warrant that allegedly had been issued to him by the Division of Taxation, warrant I.D.: E-013513410-E009-3. The letter also set forth petitioner's name, address and telephone number, as required by the regulation at 20 NYCRR 2394.5(c).

2. By letter dated July 22, 2002, the Division of Tax Appeals notified petitioner that it was necessary to file a proper petition together with a copy of the predecision warrant and the written notice of the Division of Taxation of petitioner's right to a "prompt hearing" pursuant to 20 NYCRR 2394.4.

3. On August 15, 2002, petitioner, Gregory Redman, filed a petition with the Division of Appeals, seeking a redetermination or refund of personal income tax for the year 1995 and a "prompt hearing" thereon. On the face of the petition, the notice or assessment number was listed as "E-013513410-E009-3." In item "6" of the petition, petitioner alleged that the Commissioner of Taxation and Finance failed to state the reasons for the "assessment in question" and denied him due process of law because: he was not advised of his administrative rights; a court proceeding was never initiated; and a court judgment was never obtained.

4. By letter dated August 21, 2002, the Division of Tax Appeals notified petitioner that his petition had been received, was in proper form and would be forwarded to the Division of Taxation's Office of Counsel for answer. The reference line of the letter indicated that the matter concerned personal income tax for the year 1995. A copy of this letter was forwarded to

the Division of Taxation's Office of Counsel with copies of the petition with instructions that an answer was due by November 4, 2002.

5. On October 17, 2002, the Division of Taxation mailed an answer to petitioner which denied the allegations in item "6" of the petition, asserted that the petition was untimely and stated that the burden of proof was on petitioner to show that the assessment was erroneous or improper. However, in the caption set forth on the answer, the Division averred that the year in issue was 1997 and attached a notice of deficiency purportedly issued to petitioner on or about September 28, 1998 which asserted additional tax, penalty and interest for the year 1997.

6. The instant motion to dismiss or for summary determination also concerns itself with the year 1997. In the supporting affidavit of John E. Matthews, Esq., sworn to November 26, 2002, the Division explained its choice of tax year as follows:

3. The petitioner, in his petition, declares that he is protesting 'Warrant Id: E-013513410-E0009-3'. Attached hereto as Exhibit C is a copy of petitioner's Consolidated Statement of Tax Liabilities, which indicates that the petitioner's only current liability is for Notice # L015436175. That Notice is associated with warrant [sic] ID # E013513410-W003, as indicated in the Warrant History-Assessment Summary computer screen also attached hereto within Exhibit C. Accordingly, the Division is treating the protest in this matter as a protest of Notice of Deficiency # L015436175.

CONCLUSIONS OF LAW

A. The Division's erroneous assumption, and actions thereon, that petitioner intended to contest a different warrant and different tax year dictate that its motion to dismiss and motion for summary determination be denied. Regardless of the skill with which the petition was drafted, it remains that the year in dispute and specific warrant were clearly set forth. Further, the year and tax in issue were acknowledged by the Division of Tax Appeals in its letter of August 21, 2002, also sent to the Division's Office of Counsel.

B. In *Matter of Meyers v. Tax Appeals Tribunal* (201 AD2d 185, 615 NYS2d 90, *lv denied* 84 NY2d 810, 621 NYS2d 519), the Court held that:

Tax Law article 40, however, specifically provides for ‘hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied’ [citation omitted]. Consistent with this policy, Tax Law § 2006(4) establishes a hearing as a matter of right upon request, ‘unless a right to such a hearing is specifically provided for, modified or denied by another provision of [the Tax Law].’

In this matter, petitioner did not produce a copy of the predecision warrant or the written notice of the Division of Taxation of petitioner’s right to a “prompt hearing” pursuant to 20 NYCRR 2394.4. However, rather than reject the petition, the Division of Tax Appeals proceeded on the premise that, although petitioner had not established an entitlement to a prompt hearing pursuant to the regulations at 20 NYCRR part 2394, he had established a colorable claim to a hearing since one was not specifically provided by another provision of the Tax Law which applied to him. (Tax Law § 2006[4].)

C. Having established a colorable claim to a hearing on the warrant issued for the 1995 tax year it was incumbent upon the Division of Taxation to address the issues raised. However, as noted, neither the answer nor the motion were responsive to the petition.

D. The Division of Taxation’s motion to dismiss and motion for summary determination are denied, and a hearing will be scheduled in due course.

DATED: Troy, New York
March 13, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE